UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, MICHIGAN,	.	Docket No. 13-53846
	.	Detroit, Michigan
	.	December 13, 2013
Debtor.	.	10:01 a.m.
. . . . .		

HEARING RE. MOTION TO ADJOURN HEARING; MOTION TO COMPEL THE PRODUCTION OF PRIVILEGE LOG; PRETRIAL CONFERENCE
BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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THE CLERK: All rise. Court is in session. Please be seated. Case Number 13-53846, City of Detroit, Michigan.

THE COURT: It appears we have an attorney swearing in for this morning. Okay. Would you stand at the lectern, please? And what is your name?

MS. DIBLASI: Kelly DiBlasi

THE COURT: Okay. Are you prepared to take the oath of admission to the Bar of the Court?

MS. DIBLASI: Yes, I am.

THE COURT: Please raise your right hand. Do you affirm that you will conduct yourself as an attorney and counselor of this Court with integrity and respect for the law, that you have read and will abide by the civility principles approved by this Court, and that you will support and defend the Constitution and laws of the United States?

MS. DIBLASI: I do.

THE COURT: Welcome.

MS. DIBLASI: Thank you.

THE COURT: We'll take care of your paperwork for you. Okay. I think we should begin with Syncora's motion to adjourn.

MR. HACKNEY: Good morning, your Honor. Stephen Hackney on behalf of Syncora. Your Honor, we brought the adjournment motion I would say for two broad reasons, and then there are a couple discrete issues that are also

included in the motion, but the first broad reason was that we previously had pretty significant colloquy with the Court on November 14th, I believe, with respect to the interplay between Section 364 and Section 904 as the Court is considering whether to approve the post-petition financing. And it came up in the context of our request for discovery into the needs of the city for the money, the uses of the quality of life proceeds, and how the anticipated uses will relate to the interest of the city and the interest of creditors in this case, and I think the Court may recall that we had -- you had relatively extensive colloquy both with me and with Ms. Connor and with Mr. Gordon. And at the conclusion of that, what the Court had said was I'm not going to grant the discovery today, but I invite you to return on this issue at the hearing, and we can revisit it. And part of the reason we tied that up for today, your Honor, was because we were having this -- we teed it up for today is because we were having this pretrial conference and we thought it was appropriately considered in anticipation of the hearing next week.

Your Honor, I think, in our view, there is the issue of the standard and the issue of what you are entitled to consider when you're deciding whether to grant the post-petition financing is a bit of a predicate issue to how the hearing should flow, and it's a predicate issue to the types

and the nature of the discovery that's been granted because I think that the city has taken -- took in that hearing and has taken the position that the Court is not entitled under Section 904 to consider whether the city needs the money, how it wants to use the money, and how those uses will impact the interests of creditors as well as the interest of the city. It has taken a narrower position, which is that the Court may merely consider whether the city has sought to obtain unsecured credit and, if it's unavailable, whether the secured credit that it purports -- that it wants to borrow is on the best terms that are available.

Depending on how you resolve that question I think should have an impact on both whether you grant discovery to the creditors of the type that we had previously requested or, alteratively, whether you streamline that portion of the post-petition financing hearing and say given that the city has taken the position that I cannot consider these issues under Section 904, the city has to have the courage of its convictions and also not make a record detailing all of the different challenges that the city faces and why the money will be used to assuage those challenges because I think there's a bit of a swinging door here, which is the city wants to put on through Mr. Orr or Mr. Moore, the Conway MacKenzie restructuring expert, the story of the City of Detroit and the different challenges that it faces, and it

wants to introduce that evidence into the record in order to persuade the Court to grant it the post-petition financing, but it also at the same time is saying that you're actually not entitled to review their decisions on that subject and that you're not -- that you ought not to grant us discovery that allows us to check the work of the city and its consultants in reaching the conclusions and recommendations that they've reached. So I think that is appropriately addressed today, your Honor, and what I think that you had said at the last hearing that we had before you was -- you know, at that time I don't think we had even filed our objection, so my sense of the hearing was that you were saying, "My current view is that I'm not going to grant the discovery, but I won't finally decide this issue and I'll deny your request without prejudice to come back." It seems appropriate to us for the Court to decide the issue now because if we go through the hearing and in the course of the hearing the Court decides, you know, I actually -- I've decided that under 364 I do need to decide if this post-petition financing is in the best interest of creditors, and I do need to make an assessment of how this money is going to be used, whether there are alternative noneconomic ways for the city to address certain short-term needs, whether there are other existing cash flows that it can use, and in order to -- and the potential impact on creditor recovery. I need

to assess that. Well, I think then we will be in the middle of a hearing where we will not have been given discovery into those questions in a way that allows us to develop a sufficient record.

Alternatively, if you decide today, no, I agree with the city, and I'm not entitled under 904 to probe behind how the city -- how the city intends to use the money that it wants to borrow, my review is much more limited, then I think, alteratively, that the Court should make that ruling but also that the city should have the courage of its convictions and that that portion of the post-petition financing hearing should be presented in a way that's consistent with its legal posture. This was the first -- and I will tell you, your Honor, that to the extent the Court wants to have argument on the standard under Section 364 versus 904, the individual who -- the individual attorney who is preparing on those arguments for the hearing next week is available and in the court today and will do a better job than I will of getting deep into the weeds on some of the different case law and so forth that we think informs the standard, but we did think it was an important issue that was worth bringing up today, and that is one of the first motivations for our adjournment motion.

The second one, your Honor, was specific to the forbearance agreement, and it flowed from the replies that

were filed both by the city and by the swap counterparties because in those replies, those two parties made clear that they aren't just seeking assumption of the motion -- of the forbearance agreement, warts and all, for what it is worth subject to the third-party claims. They are seeking the type of broad relief that they outlined in the proposed order that they submitted to you, and this is of concern to us because you'll remember that the first time you and I had the opportunity to meet one another was at a hearing back on August 2nd right at the outset of the case where we had sought discovery on the forbearance agreement, and the Court in that hearing -- and I went back and reviewed the transcript again last night -- I would say was relatively clear about saying, look, let me assure you that when I decide this, I decide it -- you know, it comes warts and all, comes subject to all of the third-party claims that are asserted by parties as a result of it, and that decision then heavily informed the colloquy that you and I had about the nature of discovery because you were saying, given the limited role that I perform, why do you need all this discovery, and you denied our initial request for --

THE COURT: You're focusing on the consent issue.

MR. HACKNEY: Well, I would say in terms of the third-party rights, there is not only the consent issue but also the argument that the swap counterparties cannot

transfer rights under the swap to third parties, that they cannot modify or amend the swap or the collateral agreement without consent, the fact that payments to the swap counterparties under the forbearance agreement violate the waterfall that's contained in the service contracts. The forbearance agreement implicates all of those things or it certainly does ab initio, and then it also does when you perform under it in connection with the DIP. So I think that the fact that the swap counterparties and the city are now coming to the Court and saying, no, we want you to finally determine these legal issues and we want the proposed order that we submitted to you that says we can perform without liability, no one else's consent is required -- you know, when you and I were engaging in our dialogue back on August 2nd, the city did not at that point pop up and say, "Wait a second, like we have a different view of what you can do under Section 365 and Rule 9019. We don't agree that you have this limited role. We think that you're going to decide these issues." They didn't say that, and so they actually said, yes, limited discovery is appropriate, but now we've come to the end, and they stick the reply brief in that says, no, you should decide all of these issues. So that was cause for concern for us and was the second major motivating reason in bringing the adjournment motion. Now, I do want to be up front with the Court.

THE COURT: What does that have to do with an adjournment?

MR. HACKNEY: Well, I guess what I would say is this, which is it's similar to the concerns under Section 364 versus 904, which is we will not change our argument regarding the nature of a 365 hearing or a 9019 hearing, but if we're going to go into battle where there's a risk that the Court may be deciding all of these issues, then our position is if we're at risk that the Court may decide all these issues, we need to depose, for example, the swap counterparties.

THE COURT: Why?

MR. HACKNEY: Because they're all parties to this transaction, and understanding --

THE COURT: But aren't those issues all to be determined, if at all, based on the documents?

MR. HACKNEY: No, I don't think so. I don't think so. I think that -- I don't think that you can say at this point, oh, these are just pure legal questions. I think that the way that they structure these documents, the substance of the transaction, their intentions in structuring the documents, not only are going to be relevant to your consideration, but to the extent there are ambiguities, when you have different parties going at it hammer and tong like this on what the documents mean, there is a real potential

for the need for parol evidence.

THE COURT: Every time that the parties disagree about what a document means, there's an ambiguity that opens up discovery? Is that the --

MR. HACKNEY: Not necessarily.

THE COURT: Is that the law?

MR. HACKNEY: Well, I think the law is that where the parties have advanced reasonable interpretations of the documents, multiple reasonable interpretations --

THE COURT: Isn't it the Court's job to interpret contracts as a matter of law?

MR. HACKNEY: In the proper context informed by the proper procedures, and both Orion and Sportstuff are cases that say the limited either assumption or 9019 context is not a substitute for the trial on the merits. Those are quotes. And now the city is trying to say, no, it should be --

THE COURT: Okay. But that's a different question from opening up discovery to the extent you seek it. I don't know if I agree with you or not on the question of whether this is the right time to decide those issues, but it's a long way from that to if it is, you need more discovery.

MR. HACKNEY: I think that you're right that they're separate questions. I agree that you might --

THE COURT: I'm only asking about why you need discovery, and I haven't heard it yet.

MR. HACKNEY: Well, I think the circumstances regarding the negotiation of the forbearance agreement and what the provisions mean and why they were structured in the way they were structured and whether that structuring was designed, for example, to evade consent rights, those are factual determinations that I think could be validly before the Court.

THE COURT: Suppose they were. So what?

MR. HACKNEY: That would be relevant evidence. It would be relevant --

THE COURT: To what? To how to interpret the contracts?

MR. HACKNEY: Absolutely. Absolutely, your Honor. I don't think that -- I think --

THE COURT: You need to move on.

MR. HACKNEY: Okay. Well, your Honor, the additional issues that are contained in the adjournment motion are two. One of them relates to the privilege log and our request for a privilege log.

THE COURT: And what's the relevance of that?

MR. HACKNEY: The relevance of that is this is with respect to discovery that the city did agree to produce in connection with the DIP hearing.

THE COURT: What's the relevance of it?

MR. HACKNEY: The relevance of it is that if the

information has not been validly withheld by a privilege, it may be discoverable and, thus, relevant.

THE COURT: I'll just ask one more time. What's the relevance of the privilege log?

MR. HACKNEY: The privilege log allows --

THE COURT: Suppose you look at the privilege log and say, "Ah, that's not privileged. We want it," I would ask what's the relevance of whatever it is you want?

MR. HACKNEY: You can't know until you see it, but you know it's relevant because they agreed to produce documents on this subject matter. If it's not reasonably calculated to lead to the discovery of admissible evidence, then it wouldn't be on the log.

THE COURT: What else?

MR. HACKNEY: The last issue, your Honor, is an issue that relates to the mediation, and it is an issue that has some importance, I think, to this hearing, but it's also just a generally more important hearing to the case that I wanted to raise with the Court. There have been presentations that were made by the city's consultants that existed prior to the mediation that were done under confidentiality agreements, nondisclosure agreements, that related to the way that you could use the information that was provided in those presentations, and they relate to the work that the consultants were doing. After the mediation

was ordered, the mediation I would say generally has taken two forms where there are --

THE COURT: I don't want to hear anything about the mediation.

MR. HACKNEY: I'm not going to get into the substance of the mediation negotiations. I'm just describing --

THE COURT: Why are you telling me anything about the mediation?

MR. HACKNEY: Because it impacts the evidential admissibility of evidence that's produced by the consultants in the mediation despite the fact that the presentations that are being --

THE COURT: Is the city asserting -- excuse me. Is the city -- is the city offering evidence from the mediation?

MR. HACKNEY: It is not, but it is also saying that none of the presentations that are being made by the financial advisors can be used as evidence even under seal and so on and so forth.

THE COURT: I agree with that.

MR. HACKNEY: We wanted to raise that issue now as a point of concern.

THE COURT: You have a different position?

MR. HACKNEY: Yeah, because the presentations by the financial advisors are -- I would describe them as in the way

of 2004-type information. They're not being done pursuant to 2004, but they are, "Hey, creditors, here's what's going on with our efforts on the -- on blight or police or fire," and then, yeah, separately there are negotiations, but the presentations that are being made, as I understand it, are the same type of presentations that were being made before the mediation.

THE COURT: Oh, I see what you're saying.

MR. HACKNEY: So --

THE COURT: Okay. Well, all right. We'll have a discussion about that.

MR. HACKNEY: The only reason it's relevant, your Honor, is just because that is the basis for a lot of our information about what's going on with the city, and so it does interplay --

THE COURT: I'm inclined to agree with you that just because information was presented in a mediation doesn't mean that that information is not admissible --

MR. HACKNEY: And, look --

THE COURT: -- if it's otherwise admissible.

MR. HACKNEY: Right. And one thing I want to --

THE COURT: It doesn't get shielded from our court process just because it was presented in mediation.

MR. HACKNEY: Right. And -- I agree, and I want to tell you that I'm not trying to evade the other parts of the

mediation where you may want the broader protections of there won't be any evidential admissibility because you want people to be candid in back and forth. I'm just saying given the way this has gone together, can't we have like a little bit of a switch that we flip where we say this is an FA presentation about blight, this is a negotiation. Okay. And let's flip the switch so that we can say, okay, well these decks that they're putting forward that provide this level of detail, that's subject to the NDA protections because that's how it was -- the same presentation could have been made before the mediation, and that's how it would have been handled. The only reason I'm raising that, your Honor, is it came up in one of the depositions when I was using two documents, and we ultimately got past that issue with respect to those two documents, but the city then at that point asserted, hey, these two documents --

THE COURT: This may be -- this may be something we have to deal with in the context of specific witnesses and specific documents, but --

MR. HACKNEY: I think that's fine. I agree with you, your Honor. I just want to --

THE COURT: If the question is did you say in mediation A, B, and C, I don't like that --

MR. HACKNEY: Yeah.

THE COURT: -- but if the question is are A, B, and

C true, that's a different question. There's nothing objectionable about that assuming A, B, and C are otherwise relevant.

MR. HACKNEY: Okay.

THE COURT: All right. Anything further?

MR. HACKNEY: I don't think so. Thank you, your Honor.

THE COURT: Anyone else want to speak in favor of an adjournment?

MR. MARRIOTT: Good morning, your Honor. At the risk of being a glutton for punishment, Vince Marriott, Ballard Spahr, EEPK and affiliates. We also support adjournment on the basis that Mr. Hackney has indicated. Syncora has asked for it. We believe that the production of documents and the witnesses presented by the city were based on the city's view of what we were entitled to based on the city's view of what this Court is entitled to make a decision on or not. As and to the extent -- it's our view that this Court is entitled to make a much broader inquiry and findings than the city has suggested, and the discovery that has proceeded to date is based on their narrow gatekeeping view of what this Court is entitled to. And if this Court does not agree with that narrow view, there's more discovery that we'll need.

As to the forbearance agreement piece, let me just

make two quick observations. One is that as and to the extent contracts are ambiguous, then I believe that parties are entitled to and the Court needs to hear parol evidence based upon intent, negotiations, and the like.

And, second, your Honor, as and to the extent that the city and the swap counterparties are taking the view that third-party rights under those contracts need to be determined in the context of assumption of the forbearance agreement and as and to the extent, therefore, that such assumption and settlement embodied in it will affect third-party rights via those findings by this Court, then I think third parties are entitled to discovery around those issues.

THE COURT: Around what?

MR. MARRIOTT: Around --

THE COURT: I ask that because every settlement in bankruptcy affects third parties.

MR. MARRIOTT: Yes, and that effect has to be -- if it affects third parties, your Honor, affects third-party rights, has to be fair, and I think fairness goes to an inquiry into, well, what do the documents actually say, what was intended by the parties at the time that these documents were entered into. They are ambiguous. There has been a great deal of dispute about what various provisions in very complicated documents mean.

THE COURT: So you agree with the city and the swap

counterparties that these issues should be determined now unlike Syncora?

MR. MARRIOTT: I'm not saying I agree that it should be. If this Court were to stick to its statement in August that third-party rights would flow through entirely unaffected, then that would be fine, and we wouldn't need any additional discovery.

THE COURT: Oh, all right.

MR. MARRIOTT: If, however, this Court adopts the city, swap counterparty view that these are issues that now are before it, that would require, in our view, additional discovery.

THE COURT: Thank you. Anyone else want to speak in favor of adjournment? Okay. Would the city like to be heard on this matter?

MR. HAMILTON: Yes, your Honor. Good morning, your Honor. Robert Hamilton of Jones Day on behalf of the City of Detroit. If I can take the matters that were raised by counsel for Syncora in reverse order, since the ones at the end are the easiest to resolve, on the mediation issue that Mr. Hackney raised, there is no dispute among the parties, and we were able to work out what arose during the deposition. Everybody agrees, as far as I can tell, with the rules and the protocol that your Honor articulated in the colloquy with Mr. Hackney. Our point at the deposition is if

you're going -- that we made at the deposition is if you're going to whip out a document that was shared only at a mediation, you ought to talk with us first to see if we have a problem about that because maybe it would reveal something that was confidential that we didn't want disclosed to the outside world, but with the particular document that counsel did whip out at the deposition, we determined that that was the type of document that, as your Honor described, is information that should be made public even though it was initially distributed in the mediation, and we did make it public and put it in the data room. So, as far as I can tell, we're engaged at this point in a purely hypothetical discussion about maybe there might be some other documents that were shared in the mediation that we might want to use at trial, but as we're going to get to the status conference later today, everybody is going to share their exhibits. We're all going to decide in advance what's relevant, what isn't, or if we have an objection, so we're not going to have this mediation issue arise at all. So I don't understand and I certainly don't think there is any basis to adjourn the hearing so that we can somehow decide in advance whether or not there's additional information that was shared in mediation that might be a problem at the hearing because that issue is never going to arise.

On the privilege log, there was some ambiguity in

the request that we received 12 days ago from Syncora about what type of privilege log they wanted, whether they wanted a particular document-by-document description of every document we withheld on privilege grounds or whether instead they wanted some category basis of a privilege log. When counsel for Syncora contacted me about 13 days ago or 12 days ago about that issue, I indicated that we did not understand your Honor's ruling on November 14th to require us to prepare and produce a privilege log, but we were willing to discuss it, and I wanted to -- I invited him to call me to tell me whether or not a general category one would be sufficient given the ambiguity in his original request. Counsel chose not to take my invitation to call me and instead just filed the motion to compel.

We are willing to do whatever the Court wants us to do as regard to a privilege log. We've been working on it for the past 12 days. And if the Court wants us to produce a general category privilege log, we can do that by Monday. If you want us to produce a document-by-document description of every document withheld on privilege grounds, we can do that by Monday, but it's certainly no reason to adjourn the hearing. I don't think it is materially enough in this context of a summary proceeding that they even need the privilege log, but if your Honor believes it's sufficiently material to order it, we can get it done by Monday on

whatever basis the Court or Syncora requests.

With respect to the forbearance agreement and the request for additional discovery with respect to the forbearance agreement and the assumption motion to assume it, the City of Detroit contests Syncora counsel's suggestion that our position has changed in any way from when this Court already ruled on these arguments back in August. To the extent there is some -- it is certainly the position of the City of Detroit consistent with how the Court articulated it that to the extent the Court needs to make rulings with respect to the construction of particular contract provisions, it can do so as a matter of law, to the extent it needs to do so, in ruling on the 9019 motion for a compromise of the parties' rights underneath those contracts. To the extent the Court determines that there might be some evidentiary issues involved if you were to have a full-blown trial on those contracts, as we articulated, I believe, back in August, in the context of a 9019 motion, you don't conduct a mini-trial or an evidentiary ruling on those legal issues. You consider those issues in deciding whether or not the compromise is fair and equitable or is appropriate under the standards for approving a 9019 compromise.

To the extent this Court were to determine, based on the evidentiary record and arguments that are made at the assumption hearing, that for whatever reason it cannot rule

on the merits of the 9019 motion unless it makes a factual finding on a particular ambiguity and a particular document and it is barred from making that finding because adequate discovery hasn't happened yet, then the Court can decide at that time whether it needs to allow that discovery to occur, but there is no reason to adjourn this hearing now because there's no reason to believe that such a necessary factual finding is going to arise.

The bottom line is this Court already dealt with this issue back in August, and nothing has changed, so there's no reason two days -- two business days before the hearing is about to start to adjourn it based on the issues that this Court already decided back in August.

Now, with respect to the DIP and the 364 versus 904 issue that Mr. Hackney described, the City of Detroit has gone to great lengths to provide discovery and an evidentiary record to accommodate whatever ruling this Court makes as to what the scope of -- the proper appropriate scope of review is with respect to a request for 364(c) relief in a Chapter 9 case. We have set forth in our reply -- in our motion and in our reply brief what our views are as to what the appropriate legal standards are for this Court's review of our request for relief under 364(c) to get the DIP by granting superpriority administrative status in certain liens. However, we have done whatever we can do to accommodate any

ruling this Court may make that says the scope of review is broader than what we've laid out in our brief, and counsel for Syncora is not correct to say that we have refused to provide discovery on any of the broader issues that we say in our reply brief are not within the appropriate scope of review under the law. We have given all the information we have on the need for borrowing this money, even though we believe that, given the legislative history of the 1976-77 amendments to Chapter 9 with respect to 364 and the fact that 364(b) doesn't apply and the idea that the city should have the same right to borrow unfettered by Bankruptcy Court involvement in bankruptcy that it has outside of bankruptcy, we believe that the need to borrow or the decision to borrow money to fund city services is a decision that is committed at the sole discretion of the City of Detroit and is not subject to Bankruptcy Court review under both 904 and the Supreme Court's decision in Bekins.

THE COURT: How would you articulate in one sentence what the Court's role is on your 364 motion?

MR. HAMILTON: I would -- it is to the extent the City of Detroit wishes to use special powers that are given to it in bankruptcy that it doesn't have outside of bankruptcy to borrow money, the Bankruptcy Court reviews whether or not the use of those special powers is appropriate. The ability to borrow money is not a special

power.

THE COURT: Those powers are the superpriority and the administrative expense priority?

MR. HAMILTON: And the finding of good faith under 364(e). Those three things give --

THE COURT: Is appropriate?

MR. HAMILTON: Is appropriate for you to review whether or not it is appropriate to allow the City of Detroit to use those special powers to borrow money, and in that context --

THE COURT: Is appropriate?

MR. HAMILTON: Well, whether the -- for instance, if -- it would be -- you cannot -- we would have to convince your Honor at the hearing that the City of Detroit cannot go get the financing that we have determined we need without offering those -- without offering the superpriority status or the liens, which is typical in a 364(c) hearing anyway, and we would also have to establish that the terms on which we are offering those liens in super -- in a sort of super administrative priority status, the terms on which we are offering them are reasonable. That would be relevant both to the use of those powers and to a finding of good faith under 364(e), but the decision whether to borrow the money in order to fund quality of life's or any city services is a decision -- is a political decision that, as we've

articulated in the reply brief, is one we don't think is within your scope of review. However, we have provided full discovery on that. We've given them everything we have on how we decided how much we needed to borrow, why we needed to borrow it, and the time --

THE COURT: When you say "reasonable terms," you mean -- well, let me just ask. What do you mean?

MR. HAMILTON: Like whether the commitment fee, interest rates are within market -- are within market --

THE COURT: Market standards?

MR. HAMILTON: Yeah. We need to establish in order to get a finding under 364(e) that this was the result of arm's length bargaining, good faith, and the terms are reasonable.

THE COURT: I ask you what you mean by "reasonable" because certain of the objections can be read to suggest that the terms aren't reasonable given what you want to do with the money.

MR. HAMILTON: Right. And the problem with that is that goes into the political decision of whether you should be borrowing money to fund city services, and our position, as we lay out in the reply brief, is under 904 and Bekins, that's not an appropriate review for this Court to do, but the point I'm trying to make here is if you decide that -- notwithstanding our best effort to be eloquent, that you

don't agree with us, we have provided full discovery to the objectors on what information we have as to why we think we need to borrow this money and how much. That essentially comes down to brass tacks, the cash flow projections prepared by E&Y, which we've provided.

THE COURT: What's the standard of review on the assumption motion?

MR. HAMILTON: I believe that's pretty much straightforward 9019 standard, whether it falls below the lowest level of reasonableness, I believe. I don't think that's a --

THE COURT: Okay.

MR. HAMILTON: -- novel area of law.

THE COURT: How close can you pin down how much of the DIP loan you're going to use to pay off the swaps?

MR. HAMILTON: That will be the subject of testimony at the hearing, and it is my understanding that that amount fluctuates -- I don't know -- I think perhaps even on a daily basis based on interest rates, so we'll give you the most current estimate at the time of --

THE COURT: But what is it?

MR. HAMILTON: -- the assumption hearing, and whatever is left over is then the quality of life proceeds.

THE COURT: What's the number?

MR. HAMILTON: I don't know what the current number

is, your Honor.

THE COURT: Approximately.

MR. HAMILTON: It was the subject of deposition testimony.

THE COURT: Approximately. Are we talking 200 million or 300 million or what?

MR. HAMILTON: I think it's closer to 230.

THE COURT: Within $25 million, what's the number?

MR. HAMILTON: 230 million.

THE COURT: Okay. Is it the Court's role to determine whether 230 million or whatever the number is is a fair number?

MR. HAMILTON: I'm not sure what you mean by -- oh, in terms of the compromise? It is the Court's role --

THE COURT: In terms of the buy-out of the swaps.

MR. HAMILTON: It is the -- I believe it is the Court's role to determine whether or not the city's decision to make that payment falls within the reasonable range of possible outcomes if --

THE COURT: Okay.

MR. HAMILTON: -- the underlying legal issues were litigated, and so fairness in that context is defined by as long as it falls within the range of reasonable outcomes, it's fair. If that's what you mean by "fair," then, yes, that's within your role.

THE COURT: What impact would a negative decision by this Court on that question on the assumption motion have on the DIP motion?

MR. HAMILTON: It is a condition to closing on the DIP that the parties be able to -- be able to perform under the termination -- under the forbearance agreement. If you don't approve the forbearance agreement, there's no DIP. It won't close.

THE COURT: Okay.

MR. HAMILTON: And that was confirmed in depositions last week.

THE COURT: Okay.

MR. HAMILTON: The only thing the city has not agreed to provide in discovery is the vast multitude of underlying communications that undoubtedly occurred in connection with the elaborate work that Conway MacKenzie and others have done in determining which restructuring initiatives should be pursued, how much was needed for particular restructuring initiatives, and when the money should be spent and how. We have produced the end product of all that work in detail updated through the middle of November. We have allowed them to depose a full day Mr. Moore on how those determinations were made, what standards were used, but we haven't produced all the e-mails that may have occurred between the various people at Conway MacKenzie

or the other outside consultants with the people at the city, at the fire department, the police chief, the police people, that they've done for the past year in determining how many vests need to be bought, how many new cruisers they need, what needs to be done in order to get police response times down to a national average. All those e-mail communications we have not undertaken to collect and review and produce because, quite frankly, the burden would be astronomical, and to the extent this Court were to undertake a review of each of the individual decisions that the City of Detroit has undertaken over the past year to determine what restructuring initiatives they want to pursue at this point, that type of hearing would take weeks, if not months, and we think no matter how you decide what the appropriate scope of review is under 364(c), there is no scenario where you will find that it is appropriate for the Bankruptcy Court to sit in judgment on those individual decisions about how many cruisers the City of Detroit should buy or what -- or how the police -- how the bulletproof vests -- how many needed to buy, those type of decisions, and you don't -- they don't need to see all the e-mail communications on those type of issues, but everything else we've provided discovery. We don't think it's relevant, but if you decide that you need to hear it and it is relevant, they've got discovery, and we've got witnesses available, and you can hear the -- you can hear the

evidence. We'll accommodate whatever ruling you make as to what the scope is of the evidentiary record you need in order to consider our request for relief under 364(c). On that basis, we don't think there's any justification for adjourning a hearing that has been scheduled, that everybody's been working at breakneck speed to be able to be in a position to present to you starting Tuesday of next week.

THE COURT: Anyone else want to speak against an adjournment?

MR. CLARK: Your Honor, Jared Clark, Bingham McCutchen, counsel to UBS. I'll speak very briefly just on one issue that counsel for Syncora raised. Syncora has argued since after the August 2nd hearing in its objection on the assumption motion that an exercise of the city's option under the forbearance agreement is void ab initio and of no force and effect, and, therefore, your Honor need -- should not approve the forbearance agreement, and this is based on what I believe your Honor referred to as the consent right issues. The swap counterparties believe that your Honor can and needs to look at the consent right issues as a matter of contract interpretation, as indicated; however, we do not believe that that supports any need for an adjournment.

THE COURT: All right. Thank you. Anyone else have anything further? All right. The Court will take this under

advisement until 11 o'clock and give you a decision at that time.

THE CLERK: All rise. Court is in recess.

(Recess at 10:42 a.m. until 11:17 a.m.)

THE CLERK: All rise. Court is in session. Please be seated. Recalling Case Number 13-53846, City of Detroit, Michigan.

THE COURT: Counsel are present. I do have a question for the city before I give a ruling.

MR. HAMILTON: Robert Hamilton of Jones Day on behalf of the City of Detroit, your Honor.

THE COURT: Of course, I said "a question," but I exaggerated. It's more than one. Is it the city's position that the issue of whether Syncora -- Syncora's consent to the forbearance agreement is -- or was required is an issue that the Court must determine in connection with this approval motion under 9019?

MR. HAMILTON: May I have a moment, your Honor, to confer? Your Honor, as we have articulated in our reply brief, it is our position that the Court has to determine that the contract we are trying to assume is a valid contract. In order to make the finding that the contract we're asking to assume is a valid contract, you have to make a determination on that issue.

THE COURT: So you agree with Syncora on that?

MR. HAMILTON: I don't -- I think we took the position that Syncora said the same thing in one of their earlier pleadings. I'm not sure if they've been consistent in that regard, but to the extent that they take that position, we agree with them.

THE COURT: Okay. Well, then there was just the one question. Thank you. All right. The matter is before the Court on the motion of Syncora --

MS. GREEN: Your Honor, if I may, something came up at the break relating to discovery. We have a third-party witness on our may call list named Thomas Gavin, and we were planning to depose him Monday morning to make him available for the city if they had questions for him. The city has just stated it will object to third-party discovery because they had not previously agreed to third-party discovery. I just wanted to --

THE COURT: What does the phrase "third-party discovery" mean?

MS. GREEN: That he's not a party. He used to be a financial advisor for the City of Detroit. He no longer is a -- is not currently a financial advisor for the City of Detroit.

We wanted to depose him Monday and call him as a witness at the evidentiary hearing. I wanted to confirm with the Court that that was appropriate to deal with any

objections. I don't want to call him as a witness at the evidentiary hearing and have some sort of objection to him by the city.

THE COURT: Let me suggest this. I've been advised you didn't put your appearance on the record.

MS. GREEN: I'm sorry. Jennifer Green on behalf of the Retirement Systems for the City of Detroit.

THE COURT: Let me suggest this to you to resolve your question. In connection with the motion to adjourn, I'm going to articulate as best I can the issues as I see them, and then you can consult among yourselves and see if the testimony of this witness that you want to proffer would be relevant given that these are the issues.

MS. GREEN: Okay. And I believe he would be relevant --

THE COURT: So let me ask you to stand by on that one.

MS. GREEN: I think he would be relevant to the business judgment of the city in entering into the forbearance agreement. That's what we would be proffering the witness for. He has testimony that the swap counterparties themselves had concerns about the pledge of the casino revenue back in 2009. He was a financial advisor on behalf of the city, and he worked with the city during the collateral agreement execution.

THE COURT: Okay. But to that I would ask you what is the relevance of the fact that the swap parties had concerns?

MS. GREEN: To the extent that both the city and/or the swap counterparties had concerns about the pledge of the casino revenue and the collateral agreement itself and certain objecting parties are arguing that the collateral agreement is invalid or that the casino revenue pledged does not survive the bankruptcy petition, if the city and the swap counterparties also were aware of these potential issues, I think that informs the city's business judgment in entering into the forbearance agreement, your Honor.

THE COURT: How, though?

MS. GREEN: If there were issues that they should have litigated, that is one of the arguments by some of the objecting parties.

THE COURT: Okay. But we can look at that question without having a witness tell us that Syncora or the swap counterparties were concerned about it at the time; right?

MS. GREEN: Well, I assume, your Honor, if I expect an objection --

THE COURT: Look, an issue is an issue whether the parties knew about it at the time or not.

MS. GREEN: Well, if they knew about it then and they knew about it at the time that the forbearance agreement

was being negotiated, it seems to me as though it's questionable to enter into the forbearance agreement if you knew you had very strong legal arguments that could have been --

THE COURT: Ah, but the strength of the legal arguments doesn't depend on whether the parties were aware of those legal arguments at the time, does it, or does it?

MS. GREEN: I believe it does. If you --

THE COURT: Why?

MS. GREEN: -- enter into a forbearance agreement and the argument from some of the objecting parties is that you should have litigated it rather than settle it, then to me it seems as though the knowledge of the city and the swap counterparties as to the strength of their legal arguments or the existence of certain arguments are admissions as to the strength of those arguments.

THE COURT: Are what? Admissions?

MS. GREEN: Could be admissions as to the strength or the existence of certain arguments that could have been made or defenses that existed.

THE COURT: Well, but we would evaluate the strength based on the applicable law and if there's conflicts in the law, et cetera, et cetera. All right.

MS. GREEN: Thank you, your Honor.

THE COURT: All right. First, on the motion to

adjourn, this motion suggests to the Court that it's in the best interest of all concerned and to facilitate resolution of the motion itself for the Court to identify, as best it can, what the issues are for next week's hearing, so I'm going to attempt that.

The motion to assume the forbearance agreement under Section 365, the city at least recognizes, and I believe other parties do as well, that it's as much a motion for approval of a settlement under Rule 9019 as it is a motion to assume an executory contract. I just do not believe that the fact that this agreement was reached a few days before the bankruptcy as opposed to a few days after the bankruptcy should make any substantive difference in either the outcome or the nature of the Court's consideration in determining the outcome.

As a general matter, I think the parties agree that when considering a motion to approve a settlement, the Court's role is to determine whether that settlement is fair and equitable and whether it's in the best interest of the estate as a whole. Accordingly, what is not relevant is whether the settlement prejudices creditors or any particular creditor because every settlement that's proposed to the Court arguably prejudices one or more or even all creditors. The question will remain whether the settlement is fair and equitable and in the best interest of the estate.

In determining that question, the Court concludes that the following factors in the context of this case are significant. The forbearance agreement is clearly an attempt by the parties to it to settle and resolve on a going forward basis the legal and economic issues that they faced at the time, so, accordingly, the probability of success that the city might have if it pursued any challenge to the rights of the other parties or to its own obligations as they existed at that time is a major consideration. More on this in a moment.

A second major consideration is the issue of collection. Now, when the claim to be compromised is a claim that the debtor has against a third party, of course, it's that third party's collectibility that is an issue. On the other hand, when the claim to be compromised is a third party's claim against the city or the debtor more generally, of course, the collectibility of the debtor is an issue. And in the context of this case, the Court concludes that that is an issue to be considered in determining this motion. At the same time, the Court recognizes that on this issue of collectibility it is asserted that the issue is a minimal issue because of the security interests that are claimed here, but if there are potential challenges to the validity of those security interests, those would obviously come into play in determining whether to grant this motion or not.

A third consideration is the complexity of the litigation, although more specifically considering the complexity of the litigation is only important because it bears upon the costs to the city of litigating it if there is no settlement or no settlement is approved and the delay to the process, which leads really to the fourth consideration, which is the interest of creditors. The issue here would be what impact would granting the motion or denying the motion have on the plan process, upon the city's and the public's interest in the city's reconstruction and revitalization.

Those are the factors that the Court considers important in determining whether this settlement is fair and equitable and in the best interest of the city and its creditors and its residents, but I want to -- I want to drop a significant asterisk or footnote here. In considering the probability of success on any of the issues that are compromised by this proposed settlement, it is clearly not the Court's role to resolve those issues, and the Court will not resolve any of those issues.

A motion to compromise puts its proponent in a very awkward position, and you can see that awkwardness in the city's papers here because at the same time it is acknowledging the strengths of the other parties' positions or the weaknesses of its own positions, it dare not be too articulate about either side of that lest the motion be

denied and it has to actually litigate those issues, so in the context of this motion, the Court is not interested in any evidence about what Jones Day or Mr. Orr or any of its employees or agents thought were the strengths or weaknesses of any challenges it might have to the other parties' positions in this matter or with regard to any of the positions that those other parties might take against the city. The parties' papers have identified what those challenges are on both sides, and it's for the Court, with the assistance of counsel, surely, to try to evaluate as best it can but in a summary way the strengths and weaknesses of those challenges.

So, for example, and acknowledging this violation of the general rule against giving an advisory opinion, it would be inappropriate to ask Mr. Orr what he thought the city's probability of success was in asserting issue "X" not only because that would plainly require him to disclose his communications with his counsel that are protected, but, more importantly, and with all due respect to him, the Court isn't actually that interested in what his assessment of the city's probability on issue "X" is.

Now, it appears to the Court that most of the underlying disputes between the parties that this agreement compromises are, frankly, issues of contract interpretation that would, in the ordinary course, be resolved by the Court

without evidence as a matter of law. It is certainly not the law that simply because parties disagree about contract interpretation, it's, therefore, ambiguous and under the parol evidence rule subject to the testimony of witnesses. And on this point, the Court will go one step further and conclude that after reading all of the parties' briefs, the Court does not identify a single issue of contract interpretation as to which there is such ambiguity as would permit a party to present parol evidence in support of its interpretation.

Now, this does not mean that there is not a genuine good faith dispute about the interpretation of the contract. It appears to the Court there is, but that does not mean that the contract is ambiguous. There are, however, certain defenses that the city might have that may turn on the establishment of certain facts, so, for example, I think one of the parties, perhaps Mr. Sole -- correct me if I'm wrong -- asserted that the city might have an equitable subordination argument here. It would be the purpose and function of this hearing not to try that case, not to call witnesses in support of a claim the city has that some claim or another of a given party should be equitably subordinated, but still there should be some testimony by someone or some evidence somewhere of what the factual predicate in a summary way of such a claim might be.

All right. I think that's as much as I want to say about the 9019, 365 motion.

On the debtor in possession financing motion under Section 364, the Court basically agrees with the city's position that Section 904 of the Bankruptcy Code prohibits any review of what the city proposes to do with the proceeds of the loan and actually prohibits any review beyond the narrow review that Section 364 itself requires to determine the reasonableness of the terms of the borrowing given the current market conditions for similar kinds of loans and the other technical requirements of Section 364, including the city's inability to obtain a loan on any better terms. And, of course, the Court welcomes any evidence on the issue of whether the debtor in possession financing was negotiated in good faith, but the city's proposed use of the proceeds is not a matter for this Court's consideration next week.

Having concluded all of that, the Court must conclude that the record fails to establish cause for any adjournment. Accordingly, it is denied.

Now, can we move to the final pretrial conference on this? Did you all prepare a joint pretrial statement?

MR. SHUMAKER: Good morning, your Honor. Greg Shumaker of Jones Day for the City of Detroit. Yes, your Honor, we did prepare a joint statement of facts in connection with the -- what we've referred to as the

assumption motion. We were able to hash that out over the last week or so, and I believe we filed that on Wednesday night.

THE COURT: Um-hmm.

MR. SHUMAKER: The joint statement of facts with regard to what we referred to as the PPF motion, the DIP motion, is still in progress. We're hopeful, your Honor, that the parties will be able to come up with something before the hearing next week. We've sent back some -- the city sent back a number of comments to the objectors, I think, last night, so we are very hopeful that we'll be able to achieve that, but it's still --

THE COURT: Hopeful you'll be able to achieve what?

MR. SHUMAKER: Well, a joint statement of facts with regard to the DIP motion.

THE COURT: Okay.

MR. SHUMAKER: We've submitted that to your Honor. The parties have agreed --

THE COURT: Okay.

MR. SHUMAKER: -- with regard to the assumption, the forbearance agreement facts.

THE COURT: Okay. And that's all wonderful, and I appreciate that all very much. My question had more to do with the more standard, you know, joint pretrial statement where you state your claims, you state the defenses, you

state who the witnesses will be and what the exhibits will be.

MR. SHUMAKER: Well, along those lines, the short answer, I think, your Honor, is, no, we have not been operating under the standard joint pretrial order process because we thought that it was not appropriate, but we have been working on --

THE COURT: That's okay. We can still accomplish a lot here this morning. Have all of the exhibit lists been finalized --

MR. SHUMAKER: I believe they have, your Honor.

THE COURT: -- by all of the parties on both sides?

MR. SHUMAKER: All of the exhibit lists have been submitted to the Court. The only reservation is that there are continuing depositions. There's one or two depositions left. The parties reserve the right to supplement, but, yes, the exhibit lists have all been provided, have been filed, and what we are hoping to do along the lines of a pretrial order that we haven't been following, but is to come up with what we've talked about with regard to the eligibility hearing where we do what your Honor is I would suggest proposing, which is that there would be a joint list where there would be a list of the documents to which there is no objection, and your Honor could rule on the admissibility of those, and then a corollary with the list of exhibits to

which there have been objections.

Now, the city has provided its objections to the objectors. We're waiting and discussing with them waiting for their objections to the city's exhibits, but that's underway, and we also hope to have that filed hopefully Monday. Obviously there's not a lot of time, but we are working on that actively.

THE COURT: Okay. All right. Does anyone see any obstacle to getting that to the Court by the close of business on Monday? All right. But just to be, you know, as technically accurate about this as we can, there was some overlap in exhibits at the eligibility trial --

MR. SHUMAKER: Yes, your Honor.

THE COURT: -- which created a little bit of confusion. I would encourage you to try to minimize that as much as possible, so if the city has offered an exhibit, I would discourage other parties from including that same exhibit on their lists.

MR. SHUMAKER: We'll do everything we can, your Honor.

THE COURT: If it's an exhibit, you know, in a different form or if it has, you know, attachments to it that the city's doesn't have, okay, but if it's the exact same pieces of paper, we don't need it twice.

MR. SHUMAKER: Thank you, your Honor.

THE COURT: In terms of numbering, I like the numbering system we used last time where, you know, each party takes a range of numbers in the hundreds.

MR. SHUMAKER: Your Honor, I believe that the city had zero through a hundred, although we have more than a hundred exhibits, so we may have to hog the --

THE COURT: Yeah.

MR. SHUMAKER: -- zero to 200 range.

THE COURT: Fine.

MR. SHUMAKER: But we can figure --

THE COURT: Whatever you work out is fine. I just don't want parties to use the same numbers --

MR. SHUMAKER: Understood, your Honor.

THE COURT: -- because that's going to be confusing.

MR. SHUMAKER: One outstanding issue on that is, your Honor, the city has provided electronic copies of all of its exhibits to the objectors. We've asked for those in return, but I think we've -- I don't know how many objectors have responded. As of yesterday, it was one, but it facilitates the issue of figuring out what exhibit it is and so that we can give the objections back. I don't know if a deadline is necessary, but we have had some difficulty in that regard.

THE COURT: Well, let me just ask. Can you all get your exhibits to the city in the electronic format that they

provided to you by the close of business today? All right. Hearing no objection, I'll assume that will be done. So after the hearing today, I would encourage you all to collaborate together on who gets what exhibit numbers, what exhibit ranges are assigned to which parties. Okay?

MR. SHUMAKER: Certainly, your Honor.

THE COURT: Now, who are your witnesses?

MR. SHUMAKER: The witnesses right now are the five that I mentioned last time we met, your Honor, the day before Thanksgiving --

THE COURT: Remind me.

MR. SHUMAKER: -- which was Mr. Moore from Conway MacKenzie, Mr. Doak from Miller Buckfire, Mr. Malhotra from Ernst & Young, Mr. Buckfire, and Mr. Orr. Those are the five. And I think I have --

THE COURT: All right. But I want to be sure that you constrain your examination of those witnesses to the issues that I identified here.

MR. SHUMAKER: We will do that, your Honor.

THE COURT: All right. I'd like to hear the names of the witnesses that the objecting parties intend to call, so let's have that, please. Who'd like to go?

MR. HACKNEY: I'm sorry. I didn't hear. I'm sorry.

THE COURT: I'm sorry to you, sir. My question is who's -- what witnesses are the objecting parties going to

call?

MR. HACKNEY: I'll let each speak for their --

THE COURT: Yeah.

MR. HACKNEY: My name is Stephen Hackney, your Honor, on behalf of Syncora. At this point, we only have a may call witness. We have not determined today that we will call him, and I would propose to monitor the course of the hearing and give counsel for the other side 24 hours' notice or 48 hours' notice if I refine that. I was -- refine that into the intention to call for certain. I was hoping that I might ask the city to provide us with the order of the witnesses by the close of business today. It helps us coordinate our preparation of cross-examination amongst objectors.

THE COURT: So who's your may call witness?

MR. HACKNEY: It is a potential expert witness by the name of Mr. Davido.

THE COURT: Okay.

MR. HACKNEY: Yeah.

THE COURT: Who else is going to call witnesses?

MR. GOLDBERG: Good morning, your Honor. Jerome Goldberg appearing on behalf of interested party David Sole. Your Honor, I'd like -- I just had one question, if I may. I was a little confused on the second point in your order on the issue of collectibility. I guess maybe I should just

listen to it again, but I was a little confused. There were two --

THE COURT: Well, it's not that complex. To the extent that whatever claims third parties have against the city, the issue of the collectibility of the city is an issue to be taken into account in determining the fairness of the settlement. Anyway --

MR. GOLDBERG: Okay. I understand it better now.

THE COURT: Okay. Who's your --

MR. GOLDBERG: I was -- my own confusion.

THE COURT: Who's your witness?

MR. GOLDBERG: I intend to call, at least at this point, Wallace C. Turbeville as basically an expert on the first issue. That's my -- the one witness.

THE COURT: When you say "the first issue," you mean --

MR. GOLDBERG: The issue on the equitable questions concerning the forbearance agreement itself and the DIP in relation to the forbearance agreement. I also do have a recall witness that's a -- a rebuttal witness who is Sharon McPhail. It was one of the people involved in the -- on City Council at the time of the hearing itself -- I just actually ran into her two days ago -- as a potential rebuttal witness.

THE COURT: Thank you.

MR. GOLDBERG: Can I ask one other question, your

Honor?

THE COURT: Sure.

MR. GOLDBERG: I'm sorry for --

THE COURT: That's all right.

MR. GOLDBERG: -- my inexperience. The city did file a number of objections to exhibits that, you know, I proffered, and will there be a hearing? You don't intend to hear those objections today or -- I was just trying to get some advice on that.

THE COURT: No, I don't. You know, during the course of the hearing when it comes time for your case --

MR. GOLDBERG: Okay.

THE COURT: -- you will proffer those exhibits in the ordinary course, and if the city still objects, I'll hear those objections and your response.

MR. GOLDBERG: Thank you, your Honor.

MS. DIBLASI: Your Honor, Kelly DiBlasi on behalf of Financial Guaranty Insurance Company. We intend to call Stephen Spencer of Houlihan Lokey as a witness.

THE COURT: Okay. Thank you.

MS. DIBLASI: Thank you.

MS. GREEN: Jennifer Green on behalf of the Retirement Systems. We had intended as may call witnesses Ann Langan and Irvin Corley of the City Council staff and Thomas Gavin. However, based upon today's ruling, we'll be

reassessing our may call list.

THE COURT: Okay. Any other witness names? I do want to discuss the issue of limiting time on each side for presentations.

MR. HACKNEY: Your Honor, I had some collected thoughts I was going to offer at some point, and I just wanted to make you aware of that.

THE COURT: Regarding this issue or a different issue?

MR. HACKNEY: It relates very directly to this issue and to the organization of the hearing.

THE COURT: Go for it.

MR. HACKNEY: Your Honor, I wanted to tell you that the objectors have been working together to try to organize the presentation of it for the Court so it's as coherent as possible. That's not always easy because --

THE COURT: Right.

MR. HACKNEY: -- the objectors don't always object -- in addition to the fact that we're all different firms and entities, but --

THE COURT: Right.

MR. HACKNEY: -- we don't always object for the same reasons, but we've had some success. We have eight hours that's been allocated to our side by your order, and what we have done is we had a proposal for you about how we hope to

strike the allocation of time, and I was hoping I could lay that out for you in the way of suggestion as to how it may be --

THE COURT: Okay.

MR. HACKNEY: -- most efficient. The first thing is we are going to endeavor to use a lead cross-examinationer as a way of trying to get someone to cover the main body of a witness' cross on behalf of all objectors subject to the important point that each individual objector will retain the right to do discrete amounts of cleanup if they have unique issues, but we hope to use a lead questioner style method of cross-examination. We hope to spend approximately -- we intend not to do opening statements unless the Court really wanted them. The briefs so --

THE COURT: Yeah. I leave it optional to you.

MR. HACKNEY: Our intention was not to spend our time on opening statement unless you just preferred otherwise.

THE COURT: I don't.

MR. HACKNEY: We hoped to spend approximately four and three-quarters hours on our witness cross-examination and/or our directs. I will tell you that it is somewhat -- it's more art than science when you're trying to predict time on that. It relates to things like witness responsiveness and a host of factors.

THE COURT: Of course.

MR. HACKNEY: That is our going in strategy, and we would then retain three and a quarter hours for closing argument.

THE COURT: Okay.

MR. HACKNEY: We propose to have an -- what we call an issue-based closing argument as opposed to a party-based closing argument. The idea is to try to avoid repetition. And so I wanted to suggest to you what we had thought the different mainline issues would be, although it's been impacted somewhat by today, but I was going to offer them for your consideration.

THE COURT: I have to say in this regard, you know, that how you divide this up among yourselves or what issues you articulate is not something I need right now, so if you want to keep this to yourselves and/or reconsider it at some point, that's fine, but, you know, my main issue is in fixing this time and making sure we're all on the same page regarding it, and it sounds like we are.

MR. HACKNEY: Yeah. Thank you, your Honor. I just didn't want to be in a position where I was presuming to tell you what we would be spending our argument time on because the argument, of course, is supposed to aid you in your determination, so I wanted you to have an opportunity to tell me, no, I don't want argument on that, I want argument on

this, and so forth, but we can caucus in light of today.

THE COURT: You can rest assured that if anyone is arguing into a vicinity that I don't think is helpful, I will let you know.

MR. HACKNEY: I have personal experience with that, so thank you, your Honor.

THE COURT: You do.

MR. HACKNEY: Your Honor --

THE COURT: You asked for that.

MR. HACKNEY: I did. I did, and I take it willingly. I have a follow-up question, if I could ask you, about witnesses because -- and I'll let Mr. Hamilton respond to this after I do, but with respect to the views you expressed on 904 versus 364, obviously notwithstanding our disagreement, it's heard and understood on our part, but I wanted to tell you that my interpretation of what you said to me when I look at Mr. Moore's declaration -- he's the Conway MacKenzie individual who he details here are the different problems, here's how we're going to use the money, and here's why it's going to fix them, and so on and so forth -- that that would not be relevant under the standard as you articulate it. Now, I don't want overstep, but --

THE COURT: That's right.

MR. HACKNEY: -- do you agree? Okay. That's helpful to me because we're in the process of preparing, so

I'll caucus with Mr. Hamilton about that, but that was a point of clarification.

THE COURT: All right.

MR. HACKNEY: So I've hit all the issues that I hit, and I hope I addressed your question about how we intend to use our time and --

THE COURT: Yes.

MR. HACKNEY: -- who we intend to use it with. Thank you.

MR. HAMILTON: Robert Hamilton of Jones Day on behalf of the City of Detroit, your Honor. I did have just a brief moment to caucus with Mr. Hackney, and I'm not sure we've worked all of this out. With respect to witnesses that both sides are going to call on the motion to approve the post-petition financing, it seems, given the Court's ruling, that most, if not all, of the testimony that was previewed in Mr. Moore's declaration would not be necessary and, in fact, would be immaterial under the standard you've articulated.

THE COURT: Under the standard that you advocated.

MR. HAMILTON: Under the standard that we advocated. I've advocated things, and I don't always win what I advocate, your Honor, so we were trying to cover all our bases. The two experts that the objectors have identified, Mr. Davido and Mr. Spencer, the opinions that they proffered at their depositions relate to an issue that appears to fall

on the irrelevant side, but if it doesn't, then Mr. Moore would be relevant.

THE COURT: Okay. I have to -- I have to ask you to defer your argument on this until they actually testify.

MR. HAMILTON: Well, it goes to whether we're going to have three witnesses here or zero on the issue of do we need to borrow the money now. If the question of do we need to borrow the money now or do we have enough money without borrowing to do what we want to do, if that's not within your scope of review under your ruling today, then neither Mr. Moore nor Mr. Spencer nor Mr. Davido are relevant, and they don't need to come here next Tuesday.

THE COURT: If you want me to find that it is relevant that it is necessary to borrow this money now -- this is your motion, you know -- then that suggests all that is relevant.

MR. HAMILTON: Our position is you don't need to find that, and we don't need to ask you to find that. And if that's the case, we would not need to call Mr. Moore, but then neither would Mr. Spencer or Mr. Davido need to come. And the only reason I raise it now is because it's a pretrial, and we'd kind of like to know in advance whether these three witnesses are going to have to be here on Tuesday or not. Our position is it's not relevant given your ruling, and I have not had a full opportunity to confer with Mr.

Hackney other than we thought it might be appropriate to raise it today to get it resolved. That's all I had to say at the moment.

MR. MARRIOTT: Your Honor, Vince Marriott, EEPK. If I could just speak to the findings, I think that the city's proposed order that accompanied the motion does request findings on those issues. If the city is prepared to submit a revised proposed order that strips out asking for these things, then I think we are in a better position to decide whether we need that, but so long as the proposed order asks findings on that sort of thing, you know, we're sort of stuck.

THE COURT: And that's why I asked the question that I asked, so I think the answer is really in -- of the city's own making. If there's a finding you want me to make, you better submit evidence of it, but then you open the door to rebuttal evidence on it. Otherwise I don't see the relevance of the necessity of the borrowing for the 364 motion, but, you know, it's your motion, so if you want me to make a finding on it, it's up to you. If you say no, then the objecting parties will rely on that, and, you know, you can't argue that they didn't submit any evidence.

MR. HAMILTON: Your Honor, I think we are going to take the position that it's irrelevant. I think what we should do is that I should just caucus with Mr. Marriott and

Mr. Hackney, and we should work this out by Tuesday.

THE COURT: That's an excellent idea. I have to say one more thing in the interest of justice. I wouldn't normally say this, but with all due respect to Mr. Orr, I need to emphasize to him through his counsel here the necessity of him being responsive to the questions and with the caution that if he is not, as he was not during the eligibility trial, that may constitute grounds or cause to extend the objecting parties' time to present their case.

All right. I need to get back to the issue of the privilege log, but before I do that, I want to see if there's anything else we need to cover in the context of this final pretrial conference. We have several willing attorneys, so we'll just race to the lectern.

MR. GOLDBERG: Sorry, your Honor. Jerome Goldberg on behalf of interested party Sole. I know I'm asking the indulgence of the Court, and if I'm out of line, let me know, but I have a -- honestly speaking, I'm operating in this case on virtually no budget, and my expert is testifying on that basis. I was just wondering if it's possible for me to get a sense of when I would need to -- and I have to fly him in from New York --

THE COURT: Um-hmm.

MR. GOLDBERG: -- when he might be testifying. I mean I normally would not ask, but I'm not in a position to

even pay him as my client is not in a position to pay myself.

THE COURT: Remind me how much time we allocated for the city. Was it seven, seven hours?

MR. SHUMAKER: Yes, your Honor.

THE COURT: Okay. So we may or may not quite get through the city's case on Tuesday, right, depending on recesses and whatnot, so it would either be sometime during the day on Wednesday or Thursday, so I would suggest that you collaborate with your fellow objecting parties' attorneys and see if you can agree upon the order in which witnesses are called, and that'll give you a much better sense of when your witness would come up.

MR. GOLDBERG: Thank you very much, your Honor.

THE COURT: Okay. Ms. Fish, you wanted to be heard?

MS. FISH: Yes. I didn't know if Mr. Shumaker was finished with the city's presentation. Deborah Fish from the law firm of Allard & Fish on behalf of the ad hoc COP holders. Similar to Mr. Goldberg, your Honor, my client would only like to make a five-minute presentation at the hearing. Wondering if, in fact, that could be made at the beginning so that we wouldn't have to appear every day and could just listen by phone.

THE COURT: Does anyone object to that?

MS. FISH: Thank you, your Honor.

THE COURT: All right. We will hear you first thing

Tuesday morning then. Would anyone else like to be heard in the context of any joint -- of any final pretrial order issues, questions?

MR. HACKNEY: Your Honor, would you indulge me in just one more brief colloquy on part of your ruling because I think it will help us determine whether witnesses need to come?

THE COURT: Um-hmm. Go ahead.

MR. HACKNEY: Steve Hackney again on behalf of Syncora. You know, I'm loath always to question the Court extensively, and I'll try to avoid that.

THE COURT: I appreciate that.

MR. HACKNEY: Your job is to rule, and our job is to figure it out, but you talked about the word "need" in the context of the Section 364 versus 904 context, and Mr. Hamilton and you talked about that subject with respect to different witnesses, and I just wanted to articulate a possible distinction and make sure we understand it.

The first thing I could see the Court saying is if Mr. Orr decides that the city needs a hundred police cars, I -- as the Court, I am not going to review that decision under 904. My reading of your ruling is that's clearly what you were saying on that point. There is a second concept, though, which is whether or not he should borrow the money to buy the police cars or whether or not he has existing funds

with which to borrow the police cars, and this is a second concept, which is the need to borrow. Is that also within the rubric of a decision that you will not review, which is --

THE COURT: It is.

MR. HACKNEY: It is. That clarifies it, and I appreciate it.

THE COURT: But there's an "unless" there, which I asked the city about, unless they want me to find that they need to borrow the money, but the city said, no, they don't want me to find that even though it's apparently in -- someone said it's in the order that was proposed with the motion and they're going to collaborate with you on all of that, so --

MR. HACKNEY: Thank you.

THE COURT: -- if they open that issue up, go for it. If they don't want that finding, I don't think it's necessary or appropriate under 364 in a Chapter 9 case.

MR. HACKNEY: Thank you, your Honor.

MR. SHUMAKER: One issue, your Honor, which we'd appreciate some clarification on, and that is the time limits. And now that it appears that the city will have seven hours and that the objectors will have eight hours to present their case, does the time allotted to each side include the cross-examination of the --

THE COURT: Oh, no. That's lectern time.

MR. SHUMAKER: Okay. Okay. Yes.

THE COURT: Does that answer your question?

MR. SHUMAKER: Yes, that does. That does, yes. Thank you.

THE COURT: I keep a running clock by minutes of the time each side is standing at the lectern --

MR. SHUMAKER: Thank you, your Honor.

THE COURT: -- whether it's opening, cross, direct, or closing. On the privilege log issue, one of the consequences of my earlier statement of the issues is that as an evidentiary matter, I don't think it's relevant what any particular attorney concludes regarding the strengths or weaknesses of any of the claims or defenses are nor do I think it's relevant what any particular attorney on either side for this matter told a client were the strengths or weaknesses of any particular claim or defense. So on the issue of the privilege log, I don't think that any attorney-client communications are particularly relevant in the first instance, so in those circumstances, I cannot conclude that the disclosure of a privilege log is necessary, so I won't require it.

All right. Anything further for today?

MR. HACKNEY: Can I be heard on that just briefly?

THE COURT: Yes.

MR. HACKNEY: The only desire for the log is to confirm that the documents that have been withheld are privileged. If they are privileged, I'm not disputing the idea that they can withhold them under the privilege. I'm not saying you'd put it at issue. I'm just saying I want to check.

THE COURT: Your concern is that they have withheld documents that weren't communications between attorneys and clients?

MR. HACKNEY: Well, yes, because the way privilege --

THE COURT: That would be pretty ugly.

MR. HACKNEY: Well, no. It's not necessarily uncommon when people are reviewing, especially a pace like this, which is you'll look at the to and from on an e-mail, and if you see an attorney, you'll just mark it, and then you -- when you do the log, then you do the hard calls and say, "Well, yeah, there was an attorney cc'd on this, but this is really Miller Buckfire to business guys talking business stuff."

THE COURT: Okay.

MR. HACKNEY: Then you produce it. So I didn't want there to be confusion about why I want the log. I'm not trying to say, "Oh, look at what they withheld. This is relevant." I'm trying to check their privilege calls.

THE COURT: Any response to that?

MR. SHUMAKER: Your Honor, my response would be that when we produce documents, when we gather the documents from the city and we review them and produce them, we do our darndest to give the responsive documents as we did in connection with the PPF motion, and --

THE COURT: What motion?

MR. SHUMAKER: I'm sorry. The post-petition financing, the DIP motion. I forget which one we're calling it. And so, you know, we've -- we do have to go through a review. We do have a number of people who look at those documents. They operate in good faith, do the best they can. It's, you know, a significant amount of work to undertake just under the possibility that a document was withheld that shouldn't have been. I can't represent to your Honor that that's not possible, but we do have an affirmative ongoing obligation that if we uncover something that is not privileged, we produce it.

THE COURT: All right. Well, I'll ask you to file an affidavit then by Tuesday which describes what process you used to determine which documents were privileged or to be claimed as privileged and not disclosed, therefore, what standards the staff used, and I want the representation of who's ever affidavit this is that it is that affiant's good faith belief that all of the documents withheld are subject

to a proper claim of attorney-client privilege.

MR. SHUMAKER: Certainly will do that, your Honor.

THE COURT: All right. We'll be in recess.

THE CLERK: All rise. Court is adjourned.

(Proceedings concluded at 12:13 p.m.)

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WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett December 15, 2013

Lois Garrett